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SUPREME COURT, U.S.

No. 98-490

In The

Supreme Court of the United States

October Term, 1998

ALBERT BOSSLEY, ET AL.,

Petitioners,

v.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TEXAS RULES OF CIVIL PROCEDURE 166a(d)

(d) Appendices, References and Other Use of Discovery Not Otherwise on File.

Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific reference to the discovery or specific reference to other instruments, are filed and served on all parties together with a statement of intent to use the specific discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

REPLY

The Respondents' Brief in Opposition suffers from the same fatal flaws as the Texas Supreme Court opinion in that key evidence and pleading statements are ignored. The Respondents are incorrect in their position that the testimony of Laura Moore and Domingo Davilia is not a part of the record on appeal. The Respondents are also incorrect in their position that the waiver of sovereign immunity as pled was not limited to Dallas County Mental Health and Mental Retardation ("MHMR") and Angela Jones.

1) The testimony of Laura Moore and Domingo Davilia is part of the record on appeal

a. Laura Moore

The testimony of Laura Moore is a part of the transcript below at pages 114 to 116. It was specifically attached to the Motion for Summary Judgment of MHMR and therefore is part of the record on appeal. *See McConathy v. McConathy*, 869 S.W.2d 341 (Tex. 1994). Additionally, the deposition certificate of Laura Moore was on file with the court and made a part of the record on appeal. (Respondents' App. 49, 51) The first and last pages of MHMR's Motion for Summary Judgment, transcript pages 60 and 118, respectively, are attached as appendices 1 and 2. The deposition pages of Laura Moore, transcript pages 114-116, are attached as appendices 3-5, thereby proving that the deposition excerpts of Laura Moore were part of the summary judgment evidence below.

From Laura Moore's testimony, *at a minimum* a strong inference can be drawn that Roger Bossley intentionally put his life at risk as he ran back and forth through highway traffic. This factual inference, which must be made and taken as true under Texas summary judgment practice, *see Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985), directly contradicts the specific factual predicate for the Texas Supreme Court's opinion.

b. Domingo Davilia

Although the deposition testimony of Domingo Davilia was not attached to any summary judgment motion or response below, it is Petitioners' position that it is properly a part of the record in this case. TEXAS RULE OF CIVIL PROCEDURE 166a(d) allows a respondent to give notice of intent to use unfiled evidence as summary judgment proof, which Petitioners did in this case. (Respondents' App. 13 and 14). The intermediate Texas courts of appeal are not in complete agreement concerning how the rule is satisfied. Compare *Grainger v. Western Cas. Life Ins. Co.*, 930 S.W.2d 609 (Tex. App. – Houston [1st Dist.] 1996, writ denied) with *E.B. Smith Co. v. U.S. Fidelity & Guar. Co.*, 850 S.W.2d 621 (Tex. App. – Corpus Christi 1993, writ denied).

Since Respondents (Defendants below) were moving for summary judgment on a broad range of issues, Plaintiffs' intent was to have *all* testimony in the case available for consideration because it was hard to predict what a court might deem relevant. Plaintiffs' cautious approach was prescient, as the Texas Supreme Court decided the case as a matter of fact in a way that had not been argued or responded to by either side previously. Additionally, although the Respondents objected to the notice of intent, such objections were implicitly overruled when the trial court ordered the depositions filed by order dated January 24, 1991. (Petitioners' App. 79). It is Petitioners' position that under this set of circumstances, the deposition of Domingo Davilia should be considered part of the record below. However, it is not necessary for this Court to decide this issue because the deposition testimony of

Laura Moore is unquestionably a part of the summary judgment record and is sufficient to contradict the Texas Supreme Court's version of facts.

2) The pleadings indicate that Angela Jones was the only individual defendant whose acts could have given rise to a cause of action against MHMR.

Respondents claim that the placing of the word "condition" in quotes in the petition indicates that Petitioners were attempting to trigger a waiver of sovereign immunity under TEX. CIV. PRAC. REM. CODE § 101.021. This weak argument ignores the substance of the pleadings. Every allegation made against every individual defendant except Angela Jones was specifically pled as a *failure to act,* which all parties agree does not give rise to a claim under the Tort Claims Act. Additionally, in the jurisdictional allegations of the petition (paragraph 2.00) Petitioners state that only Defendants Dallas County Mental Health and Mental Retardation and Angela Jones are being given notice under the Texas Tort Claims [Act] for suit. (Respondents' App. 2).

CONCLUSION

For the foregoing additional reasons, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	IN THE DISTRICT COURT
Plaintiffs,	
vs.	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. DORA POGUE, R.N. ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILIA AND PATRICIA PRINCE,	191ST JUDICIAL DISTRICT DALLAS COUNTY, TEXAS
Defendants,	

[p. 60] **MOTION FOR SUMMARY JUDGMENT**

(Filed Oct. 29, 1990)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now **Dallas County Mental Health and Mental Retardation Center** and files this its Motion For Summary Judgment and in support thereof would respectfully show unto the Court the following:

I.

Dallas County Mental Health and Mental Retardation Center would show unto the Court that taking into consideration the Pleadings, Depositions, Answers to Interrogatories and Admissions on file, together with the Affidavits and Court Testimony attached hereto and incorporated herein by reference and Affidavits and Court Testimony attached to the Motion For Summary Judgment as filed by Dr. John Kamphaus, Dr. Harold Urschel, (Angela Jones) Compton, Dora Pogue, Robbie Pugh, Laura Moore, Netti Langley, Florence Bates, Danny Williams, Domingo Davilia and Patricia Prince, there is

* * *

[p. 118] ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al
vs.
Dallas County Mental Health and
Mental Retardation Center, et al
MOTION FOR SUMMARY JUDGMENT
Filed: October 29, 1990
Dallas County, Texas

BILL LONG, District Clerk
/s/ _____, Deputy

TRANSCRIPT ON APPEAL BELOW

* * *

[p. 114] A. No.

Q. Before that point, had you seen Roger try to get run over by any vehicles?

A. I didn't see it. I just saw the cars swerving on the eastbound when he was crossing back and forth.

Q. Okay. At that point, did you consider that Roger's life was in danger because of the traffic?

A. Yes.

Q. And what he was doing?

A. Yes.

Q. Was anyone attempting to stop traffic at that time?

A. No.

Q. From the time that you first passed Roger and stopped the van until the time that you got out of the van and were calling to Roger, approximately how much time elapsed?

A. Two or three minutes.

Q. During that two or three minute period of time, was anybody attempting to stop the traffic?

A. No. Traffic was slowing down with all the commotion on the road. Traffic was slowing down. At least I noticed on the eastbound, where he had ran twice.

Q. All right. Okay. After you were calling to Roger and trying to talk to him, what did you see happen?

[p. 115] A. He looked at me and looked at the police car, looked at an oncoming truck and jumped in front of it.

Q. Where was the police car located?

A. Coming up the shoulder of the road, backing up, from what I remember now as we're going through this, on the westbound side, toward me.

Q. Okay.

A. But he was still a good fourth mile away from me. It was still pretty far away from me.

Q. All right. Did Roger – or do you have an opinion as to whether Roger intentionally jumped in front of the truck?

A. Yes.

Q. What is that opinion?

A. I feel that he intentionally jumped in front of the truck.

Q. Was there anything that you saw that the truck driver could have done to avoid Roger?

A. No.

Q. Was that the first attempt that you had seen Roger make to jump in front of a vehicle?

A. Visually, yes.

Q. Were you aware of any other attempt, any other way?

A. Just with the traffic on the eastbound side when [p. 116] he ran across twice.

Q. And then after Roger was hit by the truck, what did you do?

A. I ran across the highway trying to find out where he was.

Q. And did you see him?

A. Yes, I did.

Q. Did you hear Roger make any sounds?

A. No, I didn't.

Q. Did you see him move at all?

A. No.

Q. Okay. What did you do after you – I take it that you located Roger?

A. What had happened is after it happened, Alice Bradley Harmon was running toward me. She went with me across the road.

MR. BARNES: You want to take a little break?

THE WITNESS: Yes, I really would like to.

Q. (By Mr. Oake) What happened next after you located Roger?

A. I located Roger, the staff and I went up to him to see if he was breathing, to just kind of assess, and I didn't

see that he was at the time. I turned around, and the policeman was already coming down the hill.

* * *